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Nos. 00-1065 and 00-1066

In the Supreme Court of the United States

ERNEST N. MILES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

DOUGLAS R. WILLOUGHBY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FEDERAL CIRCUITS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether payments received by departing employees as part of a downsizing program are subject to Federal Insurance Contributions Act (FICA) taxes under 26 U.S.C. 3101 *et seq.*

2. Whether payments received by departing employees as part of a downsizing program are excludable from income under Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. 104(a)(2), as damages received on account of personal injury or sickness.

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OPINIONS BELOW

The opinion of the court of appeals in No. 00-1065 (00-1065 Pet. App. 1a-2a) is reported at 231 F.3d 889. The opinion of the district court in that case (00-1065 Pet. App. 3a-20a) is reported at 76 F. Supp. 2d 236.

The opinion of the court of appeals in No. 00-1066 (00-1066 Pet. App. 1a-10a) is reported at 228 F.3d 1360. The opinion of the Court of Federal Claims in that case (00-1066 Pet. App. 11a-42a) is reported at 44 Fed. Cl. 260.

JURISDICTION

The judgment of the court of appeals in No. 00-1065 was entered on October 17, 2000, and the petition for a writ of certiorari was filed on January 2, 2001. The judgment of the court of appeals in No. 00-1066 was entered on September 28, 2000, and the petition for a writ of certiorari was filed on December 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves two parallel actions that concern the tax liabilities of over 3000 employees of IBM who received payments from that company during 1988-1992 as part of that company's downsizing programs. Petitioners contend that the lump-sum payments they received upon the termination of their employment are excluded from gross income under Section 104(a)(2) of the Internal Revenue Code (as in effect during those years) as damages received "on account of personal injuries or sickness." 26 U.S.C. 104(a)(2). Petitioners also contend that these same payments are not wages subject to Federal Insurance Contributions Act (FICA) taxes under 26 U.S.C. 3101 *et seq.*

1. *No. 00-1065 (Miles v. United States)*

a. Petitioner Ernest Miles was selected to serve as the representative plaintiff for the 700 plaintiffs who filed actions in the United States District Court for the Northern District of New York.[1] From 1988 through 1996, between sixty and eighty thousand employees left work at IBM pursuant to several workforce

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[1] Petitioner Betty Miles is a party to this action solely because she filed a joint return with Ernest Miles. See 00-1065 Pet. App. 5a n.2.

reduction programs implemented at that company. 00-1065 Pet. App. 6a. These downsizing programs were adopted to encourage employees to terminate their employment with IBM either through resignation, pre-retirement leave of absence or early retirement. 00-1065 Pet. App. 6a-7a. "IBM designated the employees eligible to participate in the downsizing programs based upon a determination of surplusage in specific skills or positions." *Id.* at 6a. IBM offered a lump-sum payment to each participant that was based on the years of service and salary of the employee at the time of termination. *Id.* at App. 7a. For employees who accepted this offer, IBM withheld income and employment taxes from the payments as they were made. *Ibid.*

Eligibility in the voluntary downsizing programs was limited to employees who were in particular skill or job categories. 00-1065 Pet. App. 6a. IBM retained the right to reject any request to participate in the downsizing program from employees who possessed skills that were critical to continued operations. Eligibility for participation in the downsizing programs was not based, even in part, on whether the employee possessed any tort claim against IBM for personal injuries.[2] 00-6029 C.A. App. 99-100, 178-179, 329-330.

b. Petitioner participated in a voluntary downsizing program in 1992 which provided each participant with a lump-sump payment of one week's pay for every six months of service (up to a maximum of 52 weeks). 00-6029 C.A. App. 328. Each employee who elected to

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[2] "The primary purpose for the downsizing programs was not to obtain waivers of claims from employees nor to compensate or settle personal injury or any other tort claims of employees." 00-1065 Pet. App. 6a.

participate in the downsizing program was required to resign from the company and sign a general waiver of claims against IBM. 00-1065 Pet. App. 6a-7a. The release employed for this purpose was a broad, standard form. It was not negotiated by any of the parties and was not tailored to any participant's individual circumstances. 00-6029 C.A. App. 171-172.

Under this broad, form release, petitioner released IBM from all claims "arising from the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil [R]ights Act of 1964, as amended, and any other federal or state law dealing with discrimination in employment," as well as all "claims based in theories of contract or tort, whether based on common law or otherwise." 00-1065 Pet. App. 8a. The release specified that IBM would withhold all appropriate payroll taxes from the payment and that, if the employee thereafter returned to work at IBM, the company would have the right to require repayment of a prorated portion of the lump-sum amount. 00-6029 C.A. App. 340-341.

Petitioner has acknowledged that, before he signed this form release, he had not (i) experienced symptoms of physical or emotional harm, (ii) asserted or threatened any claim against IBM or (iii) communicated with IBM regarding any personal injuries or claims for personal injury. 00-1065 Pet. App. 4a. Petitioner further testified that he suffered no physical or emotional problems during the 1988 through 1992 period; that at the time he participated in the downsizing program, he was not aware of any injury or sickness caused by IBM; and that he did not suffer any ill health

during 1991 or 1992. 00-6029 C.A. App. 291-292, 257, 274-282.[3]

IBM's representative stated in deposition testimony that IBM was not aware of any claim for personal injury that petitioner might have had against it. He further stated that IBM did not make the downsizing payment to petitioner with the intent to compensate or settle a personal injury claim or other tort claim. 00-6029 C.A. App. 156-158, 162.

c. Petitioner timely filed his federal income tax return for 1992 and paid the taxes due. Petitioner thereafter filed a claim for refund of the income and FICA taxes withheld from his lump-sum payment from IBM. He contended that this payment was received in settlement of claims based upon tort and tort-type rights and was therefore excluded from income under Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. 104(a)(2).[4] Petitioner contended further that the separation pay did not constitute "wages" to which the FICA taxes apply. The Internal Revenue Service

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[3] Petitioners' assertions (00-1065 Pet. at 3) that IBM faced significant risk of personal injury claims from all downsizing employees, that all downsized employees suffered varying degrees of reputational and emotional injuries, and that all downsized employees had bona fide personal injury claims are not supported by the record. In fact, (i) petitioner acknowledged that he had suffered no personal injury and (ii) the court found that petitioner had adduced no facts that could support a bona fide tort or tort-type claim against IBM. 00-1065 Pet. App. 15a.

[4] Petitioner also initially claimed that a recovery on any suit arising under the Age Discrimination in Employment Act would be excluded from income under Section 104(a)(2). This Court held in *Commissioner* v. *Schleier*, 515 U.S. 323 (1995), however, that damages received in settlement of an action based on the ADEA are not excluded under Section 104(a)(2).

denied the refund claim, and petitioner commenced this refund action in district court.

d. The district court granted the government's motion for summary judgment. 00-1065 Pet. App. 3a-20a.

The court first concluded that "scrutiny of the undisputed facts leads to the inexorable conclusion that [petitioner's] payment does not fall within the exclusion of section 104(a)(2)" because the payment was not damages received in a settlement of a tort or tort-type cause of action. 00-1065 Pet. App. 15a. The court noted that the agreement between petitioner and IBM arose out of a business downsizing program and not out of any "bona fide dispute between IBM and [the petitioner]." *Ibid.* The court explained that, at the time petitioner signed the general release and received the payment, he was not aware that he had suffered, and in fact was not suffering, from personal injuries. *Ibid.* Moreover, petitioner had not notified IBM, or communicated with the company in any way, concerning any claim of physical or emotional harm. The court concluded that petitioner had "adduced no facts that an underlying bona fide tort or tort type claim existed. Accordingly, it cannot be said that the payment in exchange for the Release in any way constituted settlement of a personal injury claim." *Ibid.* The court further held that even if petitioner had suffered injuries of which he was not aware, he still could not prevail. The court explained that if IBM and petitioner were both unaware of any asserted injury, they could not have entered into a settlement of claims regarding such injuries. "In other words, * * * the parties could not settle a claim that neither knew to exist." *Id.* at 16a. The court additionally concluded that the payment was not excluded from income under Section 104(a)(2) because it was not

received on account of personal injuries or sickness. The court pointed out that the downsizing "payment was calculated based upon [p]etitioner's years of service and salary, and was in no way linked to any personal injuries he may have suffered." *Id.* at 17a-18a.

Second, the court rejected petitioner's argument that the downsizing payment was not subject to FICA taxes. The court concluded that the downsizing payment—which was calculated based upon the years of service and salary received by petitioner—represented compensation paid within the scope of the employer-employee relationship and therefore constitute "wages" to which the FICA taxes apply. 00-1065 Pet. App. 19a.

e. The court of appeals affirmed in a per curiam opinion, "substantially for the reasons stated in the opinion of the district court." 00-1065 Pet. App. 1a-2a.

2. *No. 00-1066 (Willoughby v. United States)*

a. Petitioners Willoughby, Hill, Marciano, and Jordan also received similar downsizing payments from IBM.[5] They were selected to serve as test cases from among the 2631 individual plaintiffs who filed tax refund actions in the Court of Federal Claims. As in the case just described, the downsizing programs provided a lump-sum payment based on years of service and salary, which was payable to employees if they

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[5] All but one of these petitioners participated in voluntary downsizing programs that were similar to the one in which petitioner Miles (No. 00-1065) participated. Petitioner Jordan participated in an analogous *in*voluntary downsizing program—after receiving a layoff notice, she elected to take the same downsizing payment available, and sign the same standard form release required, under the voluntary downsizing programs in which the other petitioners participated. 00-1066 Pet. App. 18a-19a.

agreed to resign or retire and sign a general release. Petitioners did not negotiate the amount of the payments, which was set by formula, and did not negotiate the form language contained in the release. 00-1066 Pet. App. 2a-4a. The general releases signed by these petitioners were in the same form described above. See page 4, *supra*. In addition, here, as in No. 00-1065, the petitioners stipulated that they did not experience any symptoms of personal injury, that they did not assert or threaten any claim against IBM for personal injury, and that they did not communicate with IBM regarding any personal injuries or claims for personal injury. 00-1066 Pet. App. 4a.

b. After their claims for refund were denied by the Internal Revenue Service, petitioners commenced these refund suits in the Court of Federal Claims. The court granted the government's motion for summary judgment on both the FICA and income tax issues. 00-1066 Pet. App. 11a-42a.

With respect to petitioners' claims under Section 104(a)(2), the court concluded that, "[v]iewing the facts and inferences from the facts most favorably to [petitioners], they arguably have shown that IBM's decision to require 'releases' stemmed from its concern over potential tort claims. [Petitioners] have not, however, adduced any evidence to show that the 'payments' or 'recovery' they received from IBM were in any way tied to that concern." 00-1066 Pet. App. 30a. The court noted that petitioners never made a formal or informal claim against IBM and, moreover, have stipulated that they never experienced any symptoms of personal injury or sickness. The court concluded that, absent any formal or informal claim and any symptoms of personal injury, there is no basis to find that the payments received by petitioners were "on account of" personal

injuries as required by Section 104(a)(2). *Id.* at App. 32a-33a. The court noted that not only had none of petitioners suffered any personal injuries or threatened any claim against IBM, but IBM had given no consideration to potential tort liability or personal injury claims in devising its payment formula and did not allocate any portion of the program payments as compensation for possible tort claims. *Id.* at 33-34.

The court concluded that, instead of compensation for personal injuries, these payments were in the nature of severance pay. 00-1066 Pet. App. 40a. Because they were calculated solely on the basis of employment tenure and salary, and had the characteristics of severance pay, the court held that these payments were derived from the employee-employer relationship and were therefore subject to FICA taxes. *Id.* at 39a-41a.

c. The court of appeals affirmed. 00-1066 Pet. App. 1a-10a. The court agreed that the downsizing payments were in the nature of severance payments and were not received "on account of personal injuries or [physical] sickness." *Id.* at 6a. The court stated that, "[e]ven assuming that the employees suffered some personal injury before entering the payment agreements, no evidence of record suggests that any part of the payments was attributable to those individualized injuries." *Ibid.* The court further noted that, "[r]ather than reflecting an individualized amount for each employee based on the unique individual injuries of that employee, the payments reflected an amount associated with the employee's work record. * * * Thus, as in [*Commissioner* v.] *Schleier*, the amount of payment was 'completely independent of the existence or extent of any personal injury.' 515 U.S. at 330." *Ibid.*

The court also rejected petitioners' claim that the downsizing payments were not "wages" subject to

FICA taxes. The court explained that the statutory term "wages" is not limited to compensation for services actually rendered. Instead, it includes all compensation paid to employees from "the employer-employee relationship." 00-1066 Pet. App. 9a (citing *Social Security Board* v. *Nierotko*, 327 U.S. 358, 365-366 (1946)). The court concluded that the fact that the receipt of benefits was conditional upon the employees' signing a broad, form release did "not change the wage-like or severance-like character of the payments." *Id.* at 10a.

ARGUMENT

The decisions of the courts of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The FICA taxes that finance Social Security and Medicare benefits were properly imposed on the lump-sum payments that petitioners received from IBM. The FICA taxes are imposed on "wages," a term that is generally defined to include "all remuneration for employment." 26 U.S.C. 3121(a). The term "employment" is, in turn, generally defined to include "any service, of whatever nature, performed * * * by an employee for the person employing him." 26 U.S.C. 3121(b).[6] In *Social Security Board* v. *Nierotko*, 327

[6] The regulations adopted by the Treasury to implement these provisions specify that remuneration for employment generally "constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them." 26 C.F.R. 31.3121(a)-1(i). Similarly, "the basis upon which the remuneration is paid is immaterial in deter-

U.S. 358 (1946), this Court noted the great breadth of these provisions in concluding that back pay awarded under the National Labor Relations Act to an employee who had been wrongfully discharged constitutes "wages" under the statutory definition (*id.* at 365-366):

> The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind, import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.

See also *United States* v. *Silk*, 331 U.S. 704, 712 (1947); *Gerbec* v. *United States*, 164 F.3d 1015, 1026 (6th Cir. 1999) ("[t]he phrase 'remuneration for employment' as it appears in § 3121 should be interpreted broadly"); *Mayberry* v. *United States*, 151 F.3d 855, 860 (8th Cir. 1998).

The lump-sum payments from IBM fall within the broad statutory definition of "wages." The payments are in the nature of severance pay. They were calculated based on each departing employee's length of service at IBM and salary at the time of separation, and they were not provided in exchange for the relinquishment of any preexisting contractual right. In fact, IBM treated the payments as wages in determining its own employment tax obligations, and the employees were required to make a repayment if they were sub-

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mining whether the remuneration constitutes wages." 26 C.F.R. 31.3121(a)-1(d).

sequently rehired.[7] Under these severance programs, the separation pay was provided to ease the employees' transition to a new career or retirement. Because the payments arose directly from the employment relationship between petitioners and IBM, they constitute "remuneration for employment" and thus represent "wages" to which the FICA taxes apply.

b. The evolution and legislative history of the FICA tax provisions reflect that payments made upon the dismissal of an employee are to be treated as "wages" subject to the FICA tax. Prior to 1950, the statute had excluded from the definition of wages for FICA tax purposes dismissal payments that the employer was not legally required to make. That exclusion was eliminated in the Social Security Act Amendments of 1950, ch. 809, 64 Stat. 477. The Committee Reports describe the effect of the change as follows:

> Therefore, a dismissal payment, which is any payment made by an employer on account of involuntary separation of the employee from the service of the employer, will constitute wages subject, of course, to the $3,600 limitation, irrespective of whether the employer is, or is not, legally required to make such payment.

H.R. Rep. No. 1300, 81st Cong., 1st Sess 124 (1949) (emphasis added). See also S. Rep. No. 1669, 81st Cong., 2d Sess. 130 (1950).

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[7] Petitioners err in suggesting (00-1065 Pet. 9; 00-1066 Pet. 9) that the payments were not intended as a substitute for income. The company's witness actually testified that the payments were in fact intended as a form of severance pay. 00-6029 C.A. App. 118-120, 178.

Applying this same rule, the courts below correctly concluded (00-1065 Pet. App. 19a) that:

> the payments were made by IBM, as employer, to Miles its employee. The payment amount was calculated based upon Miles' employment with IBM, using a formula taking into account Miles' years of service and salary. The payment must be considered as compensation within the employment relationship, although not for work actually done.

See also 00-1066 Pet. App. 39a ("The undisputed facts show that IBM calculated the payments solely on the basis of employment tenure and salary."). The courts below properly held that "the payments at issue clearly were derived from a severance-type formula based on the employee-employer relationship" and thus "constitute wages subject to FICA." *Id.* at 41a.[8]

c. Petitioners err in asserting that a series of cases dealing with employer reimbursements of employee moving and travel expenses (such as meal allowances) indicate that "post-*Nierotko* decisions have uniformly and correctly held that payments to an employee for noncompensatory reasons are not 'wages' for FICA or income tax withholding." 00-1065 Pet. 17. The cases cited by petitioners (*Allstate Ins. Co.* v. *United States*, 530 F.2d 378 (Ct. Cl. 1976), *Humble Oil & Refining Co.* v. *United States*, 442 F.2d 1362 (Ct. Cl. 1971), and *Humble Pipe Line Co.* v. *United States*, 442 F.2d 1353 (Ct. Cl. 1971)) hold only that an employer's reimbursement of costs incurred by employees does not

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[8] Petitioners therefore are wrong in asserting (00-1065 Pet. 20; 00-1066 Pet. 20) that the courts below did not determine that the downsizing payment was made as remuneration for employment.

represent "wages" subject to FICA taxes.[9] This case does not involve similar reimbursements of employee-incurred expenses, however, and the cases cited by petitioners are obviously far afield from the present case.

d. The cases that have considered the issue addressed here have consistently concluded that employer payments made in connection with downsizing programs represent "wages" to which the FICA taxes apply. See, *e.g.*, *Associated Electric Cooperative* v. *United States*, 226 F.3d 1322 (Fed. Cir. 2000); 00-1065 Pet. App. 1a-2a; 00-1066 Pet. App. 1a-10a.[10] Petitioners

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[9] Similarly, in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21, 32-33 (1978), this Court held that reimbursement of meal expenses incurred in connection with overnight travel did not constitute "wages" subject to income tax withholding. See also *Stubbs, Overbeck & Assocs., Inc.* v. *United States*, 445 F.2d 1142 (5th Cir. 1971) (living allowances provided employees at remote work sites not subject to income tax withholding).

[10] In *Hemelt* v. *United States*, 122 F.3d 204, 209 (4th Cir. 1997), the court concluded that Employee Retirement Income Security Act of 1974 (ERISA) class action "settlement payments fit easily within FICA's broad definition of " 'wages' as 'all remuneration for employment unless specifically excepted.' " *Accord, Mayberry* v. *United States*, 151 F.3d 855 (8th Cir. 1998); *Gerbec* v. *United States*, 164 F.3d 1015, 1025 (6th Cir. 1999). In *Dotson* v. *United States*, 87 F.3d 682, 690 (5th Cir. 1996), however, the court held that a component of the same class action settlement payment compensating for future lost wages was not subject to FICA taxes because it "compensated for 'loss in earning capacity,' not for services already performed." In that case, however, unlike the present case, an actual claim for damages from personal injury had been asserted and settled by the parties, and the court's conclusion was based upon the principle that "[d]amages not included in the tax code's definition of 'income' are not considered 'wages.' " *Id.* at 689. The court further noted that an award of "damages" from loss

nonetheless assert (00-1065 Pet. 19; 00-1066 Pet. 19) that, because downsizing payments are made to induce employees to leave the company, they should not be characterized as remuneration for services rendered. In an effort to support that proposition, petitioners seek to rely (*Ibid.*) on *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996). The question addressed in *Lockheed*, however, was whether certain specific retirement plan provisions were inconsistent with the requirements of ERISA. In a footnote to that decision, the Court noted that, while retirement benefits "may be defined as deferred wages," the payments received under an early retirement program compensate the employee not "so much for services rendered as for the distinct act of leaving the company sooner than planned." *Id.* at 895 n.7. It is clear that the decision in *Lockheed* has no application to the issues presented here, for the Court in *Lockheed* did not address (and had no occasion to consider) the proper interpretation or application of the FICA taxes on "wages." When the Court *has* specifically addressed FICA taxation, and considered the specific text and history of that statute, it has concluded that payments derived from the employer-employee relationship represent "remuneration for employment" to which the FICA taxes apply. *Social Security Board* v. *Nierotko*, 327 U.S. at 364-366. Nothing in *Lockheed* purports to narrow, or even address, that longstanding holding of this Court.[11]

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of future "earnings capacity" is distinct from the "remuneration for employment" to which FICA taxation applies. *Id.* at 690. For the reasons described below, that rationale is inapplicable to the present cases. See pages 16-18, *infra*.

[11] The case of *Waterman* v. *Commissioner*, 179 F.3d 123 (4th Cir. 1999), is similarly inapplicable, for it concerned whether a severance payment received under a Navy downsizing program is

2. a. The courts below also correctly held that the lump-sum payments that petitioners received from IBM are not excluded from income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness."[12] 26 U.S.C. 104(a)(2). The term "damages received" means "an amount received * * * through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." 26 C.F.R. 1.104-1(c). Under the statute and regulation, an amount may be excluded from gross income only when it is received (i) through prosecution or settlement of an action based upon tort or tort-type rights and (ii) on account of personal injuries or sickness. *Commissioner* v. *Schleier*, 515 U.S. 323, 337 (1995). Applying these settled criteria, the Second, Fifth, and Federal Circuits have unanimously concluded that the downsizing payments made by IBM that are involved in this case are not excluded from income under this statute.[13] *Gajda* v. *Commissioner*, 158 F.3d 802 (5th Cir. 1998); *Lubart* v. *Commissioner*, 154 F.3d 539 (5th Cir. 1998); 00-1065 Pet. App. 1a-2a; 00-1066 Pet. App. 1a-10a. There is no

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excluded from income as "combat" pay under Section 112 of the Internal Revenue Code. See 179 F.3d at 127.

[12] In the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605(a), 110 Stat. 1838, Congress amended Section 104(a)(2) to exclude from gross income only damages paid on account of "physical" injuries and sickness. That amendment does not apply to this case because the releases were signed prior to the effective date of that Act. See 110 Stat. 1838.

[13] Indeed, each of the 17 decided cases involving claims by former IBM employees have held that these downsizing payments are taxable compensation. See 00-1066 Pet. App. 26a.

conflict among the circuits nor other reason warranting further review in this case.

b. The record amply establishes that the payments to petitioners were not damages received in settlement of a tort or tort-type right. Petitioners stipulated that they never raised with IBM any specific tort claim or claim for personal injury, and that they never suffered symptoms of personal injuries or of physical or emotional harm as of the date they left active employment at IBM. See pages 4, 8, *supra*. The releases signed by petitioners were standard form releases that did not reflect a negotiated compromise of actual claims. Everyone who participated in each program received a lump-sum payment calculated in exactly the same way. The amount of the payment was based on salary and length of service, and was not calculated based on the value of any particular claim or injury alleged to have been sustained. The releases signed by petitioners were not negotiated by IBM and petitioners in the context of a pending claim or lawsuit, but were instead imposed in the context of a corporate downsizing effort. The releases were drafted by IBM and were not tailored to any individual circumstances. In this context, the courts below correctly concluded that there was no settlement of any tort-type claim since neither party knew "any such claim existed." 00-1065 Pet. App. 17a.

Petitioners also do not satisfy the second, independent requirement of Section 104(a)(2), that the asserted damages be received "on account of personal injuries." *Commissioner* v. *Schleier*, 515 U.S. at 336-337; see also *O'Gilvie* v. *United States*, 519 U.S. 79, 84-88 (1996). The downsizing payments were not made to petitioners on account of any personal injury; these payments compensate only for economic losses, not personal damages.

The payments and benefits offered by IBM were based upon the prior length of service and salary of the employees, and gave no consideration to any employee's individual circumstances.

The courts below thus correctly held that these corporate downsizing payments were not "on account of" any personal injury. Here, "as in *Schleier*, the amount of payment was 'completely independent of the existence or extent of any personal injury.'" 00-1066 Pet. App. 6a (quoting *Commissioner* v. *Schleier*, 515 U.S. at 330). See also 00-1065 Pet. App. 17a-18a ("[t]he payment was calculated based upon [petitioners'] years of service and salary, and was in no way linked to any personal injuries [they] may have suffered").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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